IN THE SUPREME COURT
OF THE UNITED STATES

No. 77- 515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Neil Bradley
Laughlin McDonald
Christopher Coates
52 Fairlie Street, NW
Atlanta, GA 30303

Edward Still
601 Title Building
Birmingham, AL 35203

Attorneys for Appellants

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IN THE SUPREME COURT
OF THE UNITED STATES

No. 77-

HOLT CIVIC CLUB, an unincorporated association, on behalf of its members; Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., Victoria Harris, Roy Johnson, Donald Lankford, individually, as representative members of the Holt Civic Club, and on behalf of all others similarly situated,

Appellants,

vs.

CITY OF TUSCALOOSA, a municipal corporation, on behalf of all other municipal corporations in the State of Alabama; C. SNOW HINTON, C. DELAINE MOUNTAIN, and HILLIARD FLETCHER, individually, as members of the Tuscaloosa City Commission and on behalf of all municipal executive officers and legislative bodies in Alabama; and GORDON ROSEN, individually, as City Recorder of Tuscaloosa, and on behalf of all other municipal judges in Alabama,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Northern District of Alabama, entered June 7, 1977, which order by a court of three judges dismissed appellants' complaint which sought injunctive relief against certain Alabama statutes granting extraterritorial powers to municipalities. Appellants also appeal from the order entered July 14, 1977, refusing to reconsider the dismissal of the complaint.

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Alabama dated June 7, 1977, and July 14, 1977, are unreported and are appended hereto at 1a and 4a, respectively. The opinion of the United States Court of Appeals for the Fifth Circuit reversing a previous dismissal and holding that a court of three judges was required is reported at 525 F.2d 653, and is appended hereto at 10a. The opinion of the district court refusing to call for the convening of a three-judge court and dismissing the complaint, entered July 31, 1975, is unreported and is appended hereto at 18a. Notice of appeal was filed August 5, 1977, and is appended hereto at 47a.

JURISDICTION

This action is brought under the fourteenth amendment of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343, 2201 and 2281, 42 U.S.C. §1983.

The appeal is taken under 28 U.S.C. §1253. This Court has jurisdiction to hear the appeal because the dismissal by the district court was denial of injunctive relief based upon a "resolution of the merits of the constitutional claim presented below," MTM Inc. v. Baxley, 420 U.S. 799, 804 (1975), and not upon lack of jurisdiction, standing, or a similar point, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

STATUTES INVOLVED

The three state statutes involved in this action are found in Ala. Code, Tit. 37 (1958 Recomp.). They are §§9, 585 and 733 of that title and are appended hereto at 6a.

QUESTIONS PRESENTED

1. May a state provide that residents of a geographical area shall be governed by an adjacent municipality, while prohibiting such residents from voting in municipal elections or otherwise participating in municipal government over themselves?

2. Does a claim of denial of equal protection by residents of such an area who are also

under the authority of a county government state a cause of action even though the relief they seek is not the right to vote in the municipality but rather the removal of the municipal authority over them?

STATEMENT OF THE CASE

Facts

The plaintiffs are an unincorporated association (representing its members who are similarly situated to the other named plaintiffs) and seven residents of an area located just outside the City of Tuscaloosa. The residents of this unincorporated community called Holt are subject to the "police or sanitary regulations" of the City of Tuscaloosa,[1] to the jurisdiction of the city recorder's court, and to the licensing authority[2]

1. The ambit of the "police or sanitary" ordinances is quite broad. It includes all building, gas, fire, electrical, and plumbing codes, inspection of food in restaurants and stores; prohibition of self-service gas stations; regulation of boardinghouses; traffic regulations; obscenity and nuisance ordinances; and prohibition of shooting galleries outside a small downtown area.

2. The licensing authority extends to all types of businesses, as well as cigarettes, tobacco products, wine, beer, and liquor. The license fees are limited to the amount reasonably necessary to cover the cost of the protection or regulation provided to the business or area, and may not be for general revenue purposes. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932).

of the City because they are located within three miles of the corporate limits of the City. Real and personal property located outside the City is not subject to the City's property tax nor to its zoning power.[3]

The residents of the police jurisdiction are not residents of the City so they are not allowed to vote in City elections and they are not eligible for appointment or election to City offices.

Proceedings

The plaintiffs filed this action on August 7, 1973. The defendants moved to dismiss, which (along with plaintiffs' motions for the convening of a three-judge court and certification of the classes of plaintiffs and defendants) was twice briefed. On July 31, 1975, the district court denied certification of the class, refused to convene a three-judge court, and dismissed the complaint.

3. Municipalities may only adopt development plans for their area, Ala. Code, Tit. 37, §786 et seq. (1958 Recomp.). The Alabama Supreme Court has held that Title 37, §9, does not provide authority for a city to zone its police jurisdiction, but that this could be done by express act of the legislature. Roberson v. City of Montgomery, 285 Ala. 421, 233 S.2d 69 (1970).

The court of appeals reversed and remanded on December 31, 1975, ordering the convening of a three-judge court. The defendants thereafter renewed their motion to dismiss before the three-judge court and the plaintiffs renewed their motion for class certification. The three-judge court issued its order dismissing the equal protection claims, limiting the plaintiff class, and denying the certification of the defendant class on June 7, 1977. A timely motion for reconsideration of that order was denied on July 14, 1977.

THE QUESTIONS ARE SUBSTANTIAL

Probable jurisdiction should be noted in this appeal because the decision of the court below conflicts with a decision of the United State Court of Appeals for the Eighth Circuit in Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), and because the decision below fails to follow this Court's precedent in the field of voting rights and equal protection.

Government without representation.

This action is analagous to a voting rights case in which some residents of an area are allowed to vote and others are not, yet each group is affected by the decision of the government in question. E.g., Dunn v. Blumstein, 405 U.S. 330 (1972), Cipriano v. City of Houma, 395 U.S. 701 (1969), Kramer v. Union Free School District, 395 U.S. 621 (1969), and Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975). The difference

arises only in the relief sought by the plaintiffs. In each of the cases cited above, the plaintiffs asked that they be included in the electorate because they were affected by the decisions of the government.

In this action, the residents of Holt have a choice: they could sue for the right to vote, or they could sue to have the government withdrawn from them. They have this choice because the withdrawal of the Tuscaloosa City government authority would still leave Holt residents under the jurisdiction of the Tuscaloosa County government.[4] The county in Alabama is a general governmental unit.

4. Beyond such governmental functions which are widely associated with counties -- highways, courts, elections, etc. -- an Alabama county has extensive powers, among which are the following: (all citations are to Ala. Code (1958 Recomp.) unless otherwise noted) levy taxes, support the poor, lay sewers and construct sewage treatment plants (Tit. 12, §12, 1973 Supp.); maintain streets (Tit. 12, §129); participate in a forest fire protection program (Tit. 12, §201(1)); mark boundaries of burial places (Tit. 12, §208); establish parks and museums (Tit. 12, §224); establish recreation boards (Tit. 12, §274); establish water conservation and irrigation corporations (Tit. 12, §§280, 291(1)), 1958 Recomp. and 1973 Supp.); finance waterworks through bonds or purchase outright (Tit. 12, §§4(7) and 109(10), 1975 Supp. and 1973 Supp.); establish land use controls in flood-prone areas (Tit. 12, §341, (footnote continued to next page)

The present case is most closely analogous to Little Thunder v. State of South Dakota, supra, in which an organized county governed itself and an attached area (known as an unorganized county) but did not include residents of the unorganized county in its electorate. Similarly, the City of Tuscaloosa governs itself and an attached area (known as the police jurisdiction) but does not include residents of the police jurisdiction in its electorate. The district court dismissed the equal protection claim believing that plaintiffs had sued for the wrong relief.

> Plaintiffs do not seek extension of the franchise to themselves [citing Little Thunder], but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. 2a.

In Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973),

(footnote continued from preceding page)
1973 Supp.); adopt a building code (Tit. 55, §367(11)); construct or acquire airports (Tit. 4, §37); contract with a city for the city to provide fire protection (Tit. 37, §450(2)); acquire an electrical system for the county residents (Tit. 37, §353); create a housing authority (Tit. 25, §31); zone around an airport (Tit. 4, §63); establish sanitary conditions for livestock (Tit. 2, §367).

and Associated Enterprises v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), this Court held that special-purpose districts such as irrigation and flood control authorities were not subject to the one person-one vote rule of Reynolds v. Sims, 377 U.S. 533 (1964), and Avery v. Midland County, 390 U.S. 474 (1968), because they "affect[ed] definable groups of constituents more than other constitutents." Salyer at 720-21, quoting Avery at 483. The Court held that the water storage district was of primary benefit to land and that restricting the franchise to landowners and apportioning it on the basis of the acreage owned was permissible.

In the present case, the City of Tuscaloosa exercises general governmental[5] authority over the police jurisdiction. The only things it provides for, or imposes upon, city residents but not police jurisdiction residents are zoning authority, school system, property tax, and part of the license taxes.

5. The appellants attack only the City's extraterritorial governmental powers, not its extramural power to do business.

> [The] ability or capacity for exercising control or authority over an area and persons therein ... might be termed the "governmental" power. ... [T]he ability of the municipality to do business or provide services in its capacity as a corporation [is its "corporate" power]. This corporate power is exercised extraterritorially more frequently than the government power.

(footnote continued to next page)

In Avery, this Court noted that

> while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens whether they reside inside or outside the city limits of Midland.

Avery at 484. Similarly, the City of Tuscaloosa may concentrate its attention on the area within its corporate limits, but it does make a substantial number of decisions directly affecting the residents of the police jurisdiction without allowing them, as contrasted with the residents of Midland, even a malapportioned vote in city elections.

(footnote continued from preceding page)

Maddox, Extraterritorial Powers of Municipalities in the United States, 1-2 (1955) (emphasis in original). Thus, the appellants have no quarrel with the City's selling of water, sewer, or fire protection services, but do object to City regulation of their rights to dig wells, place septic tanks, or build homes as they please without City interference.

CONCLUSION

It may be, as the district court said, that equal protection has not been extended to cover the relief which the Holt residents have prayed for. Appellants have found no similar cases. But rejection of their claim should not be based on this. Government without the elective franchise is not "a republican form of government." Art. 4, §4, Constitution of the United States.

If the extraterritorial authority is a denial of equal protection, it may also be that appellants are not entitled to the relief they seek. Perhaps extension of the franchise rather than removal of the governmental powers is the only relief a federal court could grant, or it may decide that the State of Alabama should choose which form of relief it desires to abate an unconstitutional form of government. But the question of relief is not properly the basis for dismissing appellants' constitutional claim.

The Court should note probable jurisdiction and reverse the dismissal by the district court.

Respectfully submitted,

Edward Still
601 Title Building
Birmingham, AL 35203

Neil Bradley
Laughlin McDonald
Christopher Coates
52 Fairlie St., NW
Atlanta, GA 30303
Counsel for Appellants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

HOLT CIVIC CLUB, et al., Plaintiffs,	)	[Filed June 7, 1977]
versus	)	C.A. No. 75-3323 [*]
CITY OF TUSCALOOSA, et al., Defendants.	)	

O R D E R

Before GODBOLD, Circuit Judge, McFADDEN and LYNNE, District Judges.

BY THE COURT:

The court has before it the motion of defendants to dismiss, as renewed with respect to the complaint as last amended, and the motions of plaintiffs to certify a defendant class and to certify a plaintiff class broader than a class composed of persons residing in the police jurisdiction of the City of Tuscaloosa.

It is hereby ORDERED as follows:

* This order erroneously bears only the court of appeals number.

1. Equal protection. Plaintiffs do not seek extension of the franchise to themselves, see Little Thunder v. South Dakota, 518 F.2d 1253 (CA8, 1975), but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. The motion to dismiss is GRANTED with respect to the equal protection claim.

2. Due process. Plaintiffs' due process claim essentially is that extraterritorial regulation by a municipal government is per se a violation of due process. With respect to this due process claim, the motion to dismiss is GRANTED, with leave to plaintiffs to further amend within 45 days to specify particular ordinances of the City of Tuscaloosa which are claimed to deprive plaintiffs of liberty or property.

3. The motion to certify a defendant class is DENIED.

4. The motion to certify a plaintiff class broader than persons residing in the Tuscaloosa police jurisdiction is DENIED.

5. The three-judge court is DISSOLVED, and the case is REMANDED to District Judge Frank H. McFadden as a single judge for further proceedings.

DONE this the 7th day of June, 1977.

s/ John Godbold
United States Circuit Judge

s/ Frank H. McFadden
United States District Judge

s/ Seybourn H. Lynne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

[Filed July 14, 1977]

HOLT CIVIC CLUB, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	No. 73-M-736
CITY OF TUSCALOOSA, et al.,	)	
Defendants.	)	

O R D E R

Upon consideration of the motion filed in behalf of plaintiffs to reconsider its judgment dismissing the equal protection and due process claims of plaintiffs entered herein on the 17th day of June, 1977,

It is ORDERED, ADJUDGED and DECREED by the Court that such motion be and the same is hereby denied.

DONE this 14th day of July, 1977.

s/ John C. Godbold
John C. Godbold
United States Circuit Judge

s/ Frank H. McFadden
Frank H. McFadden
United States District Judge

s/ Seybourn H. Lynne
Seybourn H. Lynne
Senior U.S. District Judge

Alabama Code, Title 37, (1958 Recomp.)

§9. Police jurisdiction; territorial. - The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town.

§585. Recorders; jurisdiction, powers and duties of. - It shall be the duty of the recorder to keep an office in the city, and

hear and determine all cases for the breach of the ordinances and by-laws of the city that may be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi-criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority.

§733. Licenses, general. - Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this section, such licenses paid to and collected by that municipality only whose boundary measured to the nearest point thereof is

closest to such business, trade or profession. Provided that this section shall not have the effect to repeal or modify the limitations in the article relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities, and insurance companies and their agents.

[525 F.2d 653]

HOLT CIVIC CLUB, etc., et al.,
Plaintiffs-Appellants,

v.

CITY OF TUSCALOOSA, etc., et al.,
Defendants-Appellees.

No. 75-3323
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.
Dec. 31, 1975.

* * *

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

AINSWORTH, Circuit Judge:

The Holt Civic Club, an unincorporated association, and individual members thereof who reside outside the corporate limits of Tuscaloosa, Alabama, but within the 3-mile contiguous zone surrounding the city known as its municipal police jurisdiction, brought suit challenging the constitutionality of the

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Alabama statutes creating such 3-mile police jurisdictions around Alabama municipalities with populations greater than 6,000 and 1.5-mile police jurisdictions around incorporated municipalities with smaller populations. Ala.Code, Tit. 37, §§ 9, 585 and 733.[1]

1. The relevant sections of Title 37 provide:

§ 9. Police jurisdiction; territorial. -- The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or right of way belonging to the city or town.

§ 585. Recorders; jurisdictions, powers and duties of. -- It shall be the duty of the recorder to keep an office in the city, and hear and determine all cases for the breach of the ordinances and by-laws of the city that may

(footnote continued to next page)

Plaintiffs seek to represent a class of all similarly situated Alabama residents who live in such contiguous zones surrounding Alabama

(Footnote continued from preceding page.)
be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority.

§ 733. Licenses, general. -- Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a licenses for like business, trade or profession done within the corporate limits of such city or town, fees and penalites excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more
(Footnote continued to next page.)

municipalities. Defendants are the City of Tuscaloosa, the three members of the governing body of the city (the members of the Commission Board), and the judge of the Recorder's Court of the city. Plaintiffs also seek a determination that these defendants are representative of a class consisting of all municipal executives, all municipal legislative bodies, and all municipal judicial officers or judges in the State of Alabama. The certification of these classes was not ruled upon. The court rejected plaintiffs' request made pursuant to 28 U.S.C. §§ 2281-84 that a three-judge court be convened and dismissed the complaint.

(Footnote continued from preceding page.)
municipalities which levy the licenses thereon authorized by this section, such licenses paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession. Provided that this section shall not have the effect to repeal or modify the limitations in this article relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities, and insurance companies and their agents.

Section 2281 is not applicable unless (1) a state statute with state-wide applicability is challenged, (2) an "officer of such state" is sought to be restrained; (3) injunctive relief is sought, and (4) there is a substantial question as to the validity of the statute under the Federal Constitution. In this case, plaintiffs clearly seek injunctive relief challenging the enforceability of a statute which does have state-wide applicability. Despite the fact that local officers of the City of Tuscaloosa named in the complaint are "chosen in a political subdivision and act[] within that limited territory," they are charged with applying statutes embodying "a policy of statewide concern." Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935). According to the allegations in plaintiffs' suit, the statutes in question create a pattern of disfranchisement

with regard to local matters in the police jurisdictions surrounding Alabama municipalities. As a practical matter, local officials are the only public officers in the state who can exercise the state-created extraterritorial municipal authority which impinges on these unrepresented areas. Accordingly, we conclude that defendants are officers within the meaning of section 2281 for three-judge court purposes. See Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); Moody v. Flowers, 387 U.S. 97, 101-102, 87 S.Ct. 1544, 1548, 18 L.Ed.2d 643 (1967)(dictum)("a three-judge court need not be convened where the action seeks to enjoin a local officer ... unless he is functioning pursuant to a statewide policy and performing a state function"); Gilmore v. James, N.D.Tex., 1967, 274 F.Supp. 75 (three-judge court), aff'd,

389 U.S. 572, 88 S.Ct. 695, 19 L.Ed.2d 783 (1968). See also Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541, 544 n.2, 92 S.Ct. 652, 654 n.2, 30 L.Ed.2d 697 (1972)(dictum).

Finally, in light of Supreme Court standards for determining the substantiality of constitutional questions for purposes of section 2281, we cannot agree with the district court that the plaintiffs' claim in this case is "wholly insubstantial," Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed. 2d 36 (1973), "essentially fictitious," Bailey v. Patterson, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 332 (1962), or "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910).

Under the circumstances, the case is remanded to the district judge for the convening of a three-judge court.

Reversed and remanded.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

HOLT CIVIC CLUB, et al., Plaintiffs,	)	[Filed July 31, 1975]
-v-	)	CIVIL ACTION NO. 73-M-736
CITY OF TUSCALOOSA, et al., Defendants.	)	

MEMORANDUM OPINION

This cause is before the Court on plaintiffs' request for a three-judge court pursuant to 28 U.S.C. § 2281 and on defendants' motion to dismiss the complaint.

Plaintiffs sue on behalf of themselves and others similarly situated. Plaintiffs are Holt Civic Club, an unincorporated association, and individual members thereof who reside in the Holt Community, an unincorporated community outside the corporate limits of Tuscaloosa but within three (3) miles thereof. Plaintiffs seek to represent

a class of Alabama residents who live outside incorporated municipalities but within 1.5 or 3-mile contiguous zones known as municipal police jurisdictions.

Defendants are the City of Tuscaloosa, three members of the city commission, and the City Recorder. The defendants are said to be representative of a state-wide class composed of municipalities and municipal officials.

Plaintiffs' primary allegaion, in the twice amended complaint, is that as residents of the Tuscaloosa police jurisdiction they are governed by Tuscaloosa ordinances but are not able to vote in municipal elections, resulting in a denial of due process and equal protection of the laws of the United States. Plaintiffs also allege that each extension of a municipal corporate limit extends the

police jurisdiction, expanding the denial of the right to vote and bringing additional persons within that police jurisdiction without their permission and without due process of law.

The action is premised on the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983. Plaintiffs assert jurisdiction under 28 U.S.C. § 1331, 1343, 2201 and 2281.

The constitutionality of three Alabama statutes is challenged: Title 27 [sic 37], §§ 9; 585; and 733, Ala. Code 1940 (Recomp. 1958).

Title 37, § 9, Ala. Code 1940 (Recomp. 1958), authorizes a municipal police jurisdiction in an area contiguous to corporate limits of either three (3) or one and one-half (1.5) miles, depending upon the population of

the municipality, to enforce police and sanitary regulations, and accompanying licensing provisions.

Title 37, § 585, Ala. Code 1940 (Recomp. 1940[sic]), sets forth generally the Recorder's duties.[1/] Plaintiffs attack only the Recorder's statutory power to enforce all municipal ordinances, civil or criminal, applicable to the police jurisdiction.

Title 37, § 733, Ala. Code of 1940 (Recomp. 1958), permits a municipality to fix and collect licenses and fees for businesses, trades or professions operating solely within its police jurisdiction. Such fees may be no more than one-half those applicable within the corporate limits and by

1/ Sections 583, 584 and 586 define further the Recorder's powers; and §§ 587-596, inclusive, provide for various additional judicial proceedings of an appellate nature beyond the Recorder's level. However, none of these provisions are challenged by plaintiffs.

judicial interpretation must be reasonably related to the licensing and inspection duties associated with the appropriate regulations. The statute also contains provisions to eliminate double collection in overlapping police jurisdictions.

The main thrust of plaintiffs' complaint is against Section 9 which sets up the police jurisdiction. The attack on the other sections is against the exercise of powers granted thereunder within the police jurisdiction.

Plaintiffs show, as typical of the inequality of their position, that the City of Northport, Alabama, or most of it, is within three miles of Tuscaloosa. Tuscaloosa does not, and cannot, exercise its police jurisdiction over residents of Northport or its police jurisdiction; but Tuscaloosa does, and can, exercise its police jurisdiction over the residents of Holt Community, who allegedly stand

in the same geographical proximity and political relation to Tuscaloosa as do the residents of Northport and its police jurisdiction. Thus, plaintiffs contend, the residents of Holt Community are "governed" by Tuscaloosa, but the residents of Northport are not.[2/]

Plaintiffs seek a declaration that § 9 in its entirety and §§ 585 and 733, each partially, are unconstitutional and an injunction enjoining their enforcement or operation. While plaintiffs argue--apparently to avoid the tax anti-injunction statute (26 U.S.C. § 7421)--that they do not challenge the taxes and fees collected, they do seek a preliminary injunction requiring that all taxes and fees collected from persons or

2/ The "political relation" contention apparently ignores the distinguishing fact that Northport is a municipality incorporated under Alabama law, whereas Holt is an unincorporated community.

businesses solely within the Tuscaloosa police jurisdiction be considered to have been paid under protest for purposes of rebate should the statutes be found unconstitutional.

Defendants challenge plaintiffs' standing to bring this action and this Court's jurisdiction. There are two "standing" questions: one is addressed to the question of plaintiffs' right to sue on behalf of residents of the police jurisdiction zone; and the other, to the right to sue on behalf of persons living beyond the current police jurisdiction who may be brought within such jurisdiction later. Defendants further assert that the Court does not have subject matter jurisdiction.

Plaintiffs, as residents of Tuscaloosa's police jurisdiction, are the only parties who could attack § 9 and assert equal protection claims herein since they are the only persons who are affected by the authority asserted

over the police jurisdiction. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 93 S.Ct. 1224 (1973); Community for Pub. Ed. and Religious Liberty v. Rockefeller, 322 F.Supp. 678 (S.D.N.Y. 1971). The Court, therefore, is of the opinion that plaintiffs have the requisite standing to raise this issue.

However, the Court is of the opinion that plaintiffs have no standing insofar as they seek to represent persons currently living beyond the police jurisdiction who may later be brought within it by an expansion of the Tuscaloosa corporate limits.

Defendants contend that since municipal corporation is not a "person" for purposes of 42 U.S.C. §1983 under the teachings of City of Kenosha, Wis. v. Bruno, 412 U.S. 507, 37 L.Ed.2d, 109, 93 Sup.Ct. 2222 (1973), the

Court lacks jurisdiction. Insofar as the city itself is concerned this is true. However, there are other individual defendants and the Court has subject matter jurisdiction. Adams v. City of Colorado Springs, 308 F.Supp. 1397, aff'd 399 U.S. 901, 90 S.Ct. 2197 (1970). It is unnecessary, therefore, to consider defendants' other jurisdictional contentions.

The next question considered is whether a three-judge court should hear this case.

The federal three-judge statute, 28 U.S.C. § 2281, reads in pertinent part that

> An interlocatory or permanent injunction restricting the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute ... shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges ....

Stated briefly, § 2281 will not be applicable unless (1) a state statute is challenged, (2) a state officer is a party-defendant, (3) injunctive relief is sought, and (4) it is claimed that the statute under attack is contrary to the United States Constitution. Section 2281 is "an enactment technical in the strict sense of the term and [is] to be applied as such." Phillips v. United States, 312 U.S. 246 (1941). Accordingly, failure to meet any of these basic requirements is fatal to the request for a three-judge court; and the case should be heard by a single district court judge. Morales v. Turman, 383 F.Supp. 53 (E.D. Tex. 1974).

First, the challenged statute must be a "state" statute, of general and statewide application. It is not, however, simply an act passed by a state legislature. Rorick v. Board of Comm'nrs., 307 U.S. 208, 59 S.Ct.

808 (1939) (a three-judge court not required in a challenge to a Florida statute which only affected a single drainage district's bond issue, even though an earlier Florida statute created the entire state drainage district system); Moody v. Flowers, 387 U.S. 97 (1967) (three judges not necessary in a suit challenging a county election scheme required by a state statute since the scheme applied only to the county concerned).

While there is no clear-cut test to identify a "matter of statewide concern," there are significant factors to be considered: first, whether the statute applies only to a limited geographic area, Moody v. Flowers, supra; Sailors v. Bd. of Education, 387 U.S. 105 (1967); Rorick v. Bd of Comm'nrs, supra; second, whether the issue is such that a

decision against the statute will have far-reaching effects, Flast v. Cohen, 392 U.S. 83, 89-80, 88 S.Ct. 1942 (1968); and third, whether the actions sought to be enjoined are a reflection of significant state policy, although those actions may affect only one area of the state, Spielman Motor Co. v. Dodge, 295 U.S. 89, 94, 55 S.Ct. 678 (1935).

In light of the foregoing considerations, the Alabama statutes in question do not appear to meet the standards of the "state" statute requirement of § 2281. While each of the statutes is an enactment by the Alabama state legislature which purports to apply to all Alabama municipalities, there is no indication that they are anything other than enabling statutes. As such, they allow a municipality to enforce certain types of regulations within a limited contiguous area if it chooses.

A constitutional attack on state enabling legislation does not differ substantially from such an attack on clearly local city ordinances; and three judges would not be required to hear the case. Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585 (1928); McCrimmon v. Daley, 418 F.2d 366 (7th Cir. 1969); Hardy v. Bd. of Supervisors of Dinwiddie County, Va., 387 F.Supp. 1252 (E.D. Va. 1975); Morales v. Turman, supra, at 63-64; Aberdeen Cable TV Service v. City of Aberdeen, S.D., 325 F.Supp. 406 (D.S.D. 1971); Davis v. City of Little Rock, Ark., 136 F.Supp. 725 (E.D. Ark. 1955). Nothing in the complaint indicates that the Tuscaloosa police jurisdiction regulations are from any source other than purely local municipal ordinances.

The Court is of the opinion that the actions sought to be enjoined do not reflect

a policy of such magnitude as to require the deliberation of three federal judges rather than one. Even where a decision may have repercussions throughout the state, the focus of the constitutional attack may still be purely local and not require three judges. Griffin v. County School Bd. of Prince Edward County, Va., 377 U.S. 218, 228, 84 S.Ct. 1226 (1964); Bd. of Regents of the Univ. of Texas System v. New Left Education Project, 404 U.S. 541, 543-44 (1972); Dove v. Bumpers, 497 F.2d 895 (8th Cir. 1974)(Arkansas statute couched in general terms applied to only two cities); Rothblum v. Bd. of Trustees, 474 F.2d 891 (3d Cir. 1973) (policy of trustees for the only two New Jersey medical schools created by state statute not a matter of statewide concern or policy); Mortillaro v. Louisiana, 356 F.Supp. 521, 526 (E.D. La.

1972) (attacks on state constitutional provisions having only local application do not require three judges); Ripley v. Stidd, 308 F.Supp. 854 (D. Minn. 1970) (three judges not required for local statute even where it uses terminology identical to state statute).

Second, a state official must be made a party-defendant to a suit requesting a three-judge court. No state officer is named in the complaint; and plaintiffs so concede. Plaintiffs argue, however, that the named defendants are local officials who perform state functions, thereby coming within the exception for local officials who act in a matter of general, statewide concern. City of Cleveland v. United States, 323 U.S. 329 (1945); Spielman Motor Co. v. Dodge, supra.

The Court cannot agree. These Tuscaloosa officials are performing tasks which are

entirely local in nature. The fact that the state has delegated to a municipality the general authority to promulgate police and sanitary regulations to be exercised extra-territorially does not in and of itself make local elected officials arms of the state for purposes of § 2281. Davis v. City of Little Rock, Ark., supra, at 728; Connor v. Bd. of Comm'nrs of Logan County, Ohio, 12 F.2d 789 (S.D. Ohio 1926).

Moreover, the Fifth Circuit has recently reaffirmed the severity of this requirement. Relying upon Ex parte Collins, supra, and Petition of Public Nat'l Bank of N.Y., 278 U.S. 101 (1928), the Court in Tramel v. Schrader, 505 F.2d 1310, 1312 (5th Cir. 1975), held that a three-judge court "is not required when an action is brought only against local officials who are enforcing municipal orders." See, also, Ripley v. Stidd, supra.

Third, injunctive relief must be sought. Plaintiffs here seek an injunction against the enforcement of the statutes and to that extent meet this requirement. A portion of the relief sought, however, i.e., a determination that the paying of taxes be judicially determined to have been under protest cannot be granted and that portion of the complaint may be dismissed by a single judge. Maryland Citizens for a Representative Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970). The mere prayer for injunctive relief is not sufficient. The Court must examine the complaint for substantive allegations which would support a claim for injunctive relief. If the complaint fails to allege facts sufficient to invoke traditional equitable jurisdiction, there is no need to convene a three-judge court. Majuri v. United States, 431 F.2d 469 (3d Cir. 1970).

Traditionally, courts have weighed four factors in considering a request for injunctive relief: (1) whether there is a substantial likelihood that plaintiffs will prevail on the merits; (2) whether there is a substantial threat that plaintiffs will suffer irreparable injury if interlocutory relief is not granted; (3) whether the threatened injuries to plaintiffs outweigh the threatened harm the injunction may do to the defendants; and (4) whether the granting of a preliminary injunction will disserve the public interest. See, Buchanan v. U.S. Postal Service, 508 F.2d 259, 266 (5th Cir. 1975); Allison v. Froehlke, 470 F.2d 1123, 1126 (5th Cir. 1972).

Neither plaintiffs nor defendants herein have addressed the question of the presence or absence of the requirements of equitable

jurisdiction. The Court is of the opinion that the complaint does not show a basis for equitable relief.

The final requirement for the three-judge court is that the statute under attack must be challenged on the ground that it is contrary to the United States Constitution. The complaint alleges a violation of the Fourteenth Amendment's equal protection and due process clauses, but the alleged constitutional issue alone is not enough. There must be a substantial federal question. In the absence of a substantial federal question no need exists for a three-judge court. Jones v. Branigin, 433 F.2d 576 (C.A. 6, 1970). The Court is of the opinion that the complaint does not present a substantial federal constitutional question which would require decision by a three-judge court even if the other

requirements were present. Thus, none of the requirements for a three-judge court is present and one need not be convened. The Court is also convinced that the complaint is due to be dismissed.

The Fourteenth Amendment does not prohibit states or political subdivisions thereof from prescribing regulations under their police power limited in either the objects to which they are directed or by the territory in which they are to operate, so long as all persons subjected to such legislation are treated alike under similar circumstances, both in the privileges conferred and in the liabilities imposed. The test to be applied is that there must be a reasonable relation between the objective of the statute under attack and the means used to achieve it. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884);

Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887); Marchant v. Pennsylvania R.R. Co., 153 U.S. 380, 14 S.Ct. 894, 38 L.Ed. 751 (1894).

The general test applied where denial of equal protection allegedly rests upon arbitrary classification under the police power is that: (1) states and their delegatees are given a wide scope of discretion in classifying under police power regulations, which will not be disturbed unless there is no reasonable basis for the classification; (2) where there is a reasonable basis for it, the classification need not be made with "mathematical nicety" and will not be invalid because in practice there is some inequality; (3) when a classification is challenged, if any set of facts reasonably can be conceived to support it, the existence of those facts

at the time the law creating the classification was enacted must be assumed; and (4) those attacking the law and the classification bear the burden of showing there is no reasonable basis for it and that the classification is essentially arbitrary. McGowan v. Maryland, 366 U.S. 420 (1961); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

Although approached from a different consideration, the "Milk Cases" (and other cases involving the Commerce Clause) support the conclusion that the extra-territorial operation of properly delegated police power does not violate the Fourteenth Amendment. Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Parker v. Brown, 317 U.S. 341 (1943) (raisons); Milk Control

Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Miller v. Williams, 12 F.Supp. 236, 241 and 244 (D. Md. 1935).

Generally, those cases involved challenges to various state statutes or local ordinances on the ground that the inspection and price restrictions which were placed on producers of milk and other party products who were beyond certain geographic limitations imposed by those regulations were an unconstitutional burden on interstate commerce. Where facts supported it, the Supreme Court found the regulations created an economic barrier which protected a major state or local industry and thus burdened interstate commerce. In each instance, however, the Court first had to consider the police power arguments advanced by the state or municipality before it could

conclude that those arguments merely disguished [sic] the real purpose of creating the economic barrier.

In each instance, the first and only substantial justification for the existence and operation of the regulations was in furtherance of the health, safety and welfare of the citizens involved--a valid exercise of police power. At no time, as far as the Court can determine, was a regulation ruled unconstitutional on the ground that its extra-territorial operation, in and of itself, violated the equal protection clause when it was shown that such operation was a necessary and valid exercise of police power. This was true even where there was some adverse economic impact on a plaintiff. In the instant case, the mere fact that the operation of § 9 subjects plaintiffs to some tenuous government influence over which they may have

no voice does not, of itself and without more, invalidate a reasonable exercise of properly delegated police power, even where operating extra-territorially.

It is clear that Alabama may delegate to local governments the portions of its police power which come under the heading of police and sanitary regulations. Within constitutional limits, a local government may exercise that power unchecked and may exercise it, within further limits, extra-territorially. The Court has been shown nothing which would undercut this presumption of constitutionality. Plaintiffs make no allegations of invidious classifications. The only classification attacked by way of example is the distribution between the Holt Community and the City of Northport. As noted at p. 3 [23a], supra, this distinction is valid.

Plaintiffs argue, however, that, as did the milk producers, the operation of the statute infringes on a constitutionally guaranteed right--here, the right to vote. Plaintiffs analogize their position to that of those who prevailed in the voting cases which have held, generally, that any dilution or debasement of the right to vote, once that right has been found to exist, is a denial of equal protection of the laws.

It does not appear, however, that plaintiffs come within the ambit of the voting rights and election cases. As the Court reads those decision,[3/] the crucial factor is that

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3/ See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Hadley v. Junior College Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970); Cipriano v. City of Houma, La., 395 U.S. 701 (1969)(per curiam); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Avery v. Midland County, Tex., 390 U.S. 474 (1968) Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Citizens for Community Action at the Local Level. Inc. v. Ghezzi, 386 F.Supp. 1 (W.D.N.Y., 1974).

the franchise was granted to one group of persons to the detriment of another group. Most often, one group had votes with weight disproportionate to the votes of others, or there had been an intentional juggling of boundaries for the purpose of excluding a particular group from voting. Of greater importance, however, is the fact that the adversely affected group already possessed the minimum voting requirements within the particular jurisdiction in which it sought to vote (i.e., state legislative or school board elections). See, Kramer v. Union Free School Dist. No. 15, supra; Gray v. Sanders, 372 U.S. 368 (1963).

Plaintiffs do not contend that they meet any of the voter requirements for voting in Tuscaloosa elections. Thus, the existence of the basic right is absent; and this would

preclude plaintiffs from asserting that they are denied the right to vote for the city government since they have no standing to do so. Garren v. City of Winston-Salem, N.C., 463 F.2d 54 (4th Cir. 1972).

The fact that plaintiffs do not enjoy the same recourse to the ballot box as citizens of Tuscaloosa is not the result of an invidious or suspect classification or any other act of discrimination. Since the plaintiffs have not shown that they are being deprived of any benefit or right otherwise due them on the basis of an unreasonable or unjustified classification, there is no occasion to consider or apply the compelling state interest test as in Dunn v. Blumstein, supra; Garren, supra.

There does not appear to exist any set of facts which, if adduced, would permit the

Court to grant the relief sought by plaintiffs. The complaint, as amended, therefore, must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. A separate order will be entered accordingly.

s/ Frank H. McFadden
Chief Judge

July 30, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

[Filed Aug. 5, 1977]

HOLT CIVIC CLUB, et al.,	)	
Plaintiffs,	)	
V.	)	CA 73-M-736
CITY OF TUSCALOOSA, et al.,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Holt Civic Club, an unincorporated association, Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., Victoria Harris, Roy Johnson, Donald Lankford, plaintiff above named hereby appeal to the Supreme Court of the United States from the Order denying plaintiffs' motions to certify plaintiffs and defendants as representatives of state-wide classes and to enjoin the enforcement of certain statutes and practices, entered on 7 June 1977, and

the Order denying reconsideration thereof, entered on 14 July 1977. This appeal is taken under 28 USC § 1253, relating to appeals from district courts composed of three judges.

SUBMITTED BY:

s/ Edward Still
Edward Still
601 Title Building
Birmingham, AL 35203
205/322-1694.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing a copy of the foregoing with the Court, I mailed or delivered a copy of the foregoing to the following:

Mr. J. Wagner Finnell
Box 2089
Tuscaloosa, AL 35401

DATE: 5 Aug. 77 s/ Edward Still
EDWARD STILL